

1 || E-filed on 5/30/06

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 IN RE CYGNUS TELECOMMUNICATIONS
11 TECHNOLOGY, LLC, PATENT
LITIGATION

No. MDL-1423

C-04-01791
C-03-03594

This order relates to:

ORDER GRANTING DEFAULT JUDGMENT

CYGNUS TELECOMMUNICATIONS
TECHNOLOGY, LLC.

[Re Docket Nos. 14, 18, 27, 30, 31 in Case No. 04-01791; 86 in Case No. 03-03594]

15 Plaintiff

16 || v.

17 | ACCESS NETWORK SERVICES,

18 || Defendant.

19 | and

20 CYGNUS TELECOMMUNICATIONS
TECHNOLOGY, LLC,

Plaintiff,

V

24 VOICEWARE SYSTEMS CORPORATION;
25 THE TELEPHONE CONNECTION OF LOS
26 ANGELES; TELCAN INCORPORATION;
ANDREW KAWESKI; ALLIANCE
CALLBACK COMMUNICATIONS; ACCESS
NETWORK SERVICES; INTERACTIVE
MEDIA TECHNOLOGIES, INC;

Defendants.

1 Plaintiff Cygnus Telecommunications Technology, LLC moves for a default judgment
 2 against defendant Access Network Services. For the reasons given below, the court will largely
 3 grant Cygnus the relief it seeks.

4 **I. DEFAULT JUDGMENT AGAINST ACCESS NETWORK**

5 Cygnus filed a patent infringement suit involving U.S. Patent Nos. 5,883,964 and 6,035,027
 6 against Access Network in late 2003. Cygnus alleges that Access Network uses and offers for sale
 7 Cygnus's patented inventions in violation of 35 U.S.C. § 271(a). Access Network has yet to appear
 8 in the action, and the clerk entered Access Network's default on August 4, 2004. Dkt. no. 6, Case
 9 No. 04-01791. On November 29, 2005, the court ordered Access Networks to provide to Cygnus by
 10 January 13, 2006 information for an accounting.¹ Cygnus's initially sought only monetary damages
 11 from Access Network, but then decided to pursue injunctive relief, as well.

12 **A. Damages**

13 Cygnus presents evidence which it claims shows Access Network's liability to Cygnus:
 14 According to the Access Network website, "Ezcor Direct" is the "invoicing entity" for Access
 15 Network. *See* Sutton Decl.,² Ex. 105 at 7, Case No. 04-01791. On February 28, 2003, Ezcor Direct,
 16 Inc. and the GlobalTel Division of InterActive Media Technologies Inc.³ entered into a contract
 17 whereby the former transferred its "customer base and switching capabilities" in "international call-
 18 back" to, and became a marketing agent of, the latter. *Id.*, Ex. 245 at 1, 4. Between April 11, 2003
 19 and December 5, 2005, "IMT paid Access Network Services on behalf of Ezcor Direct, Inc."
 20 commissions totaling \$293,293.18.⁴ *See* Sutton Decl., ¶ 6-7, Ex. 246 at 1, Ex. 247 at 1. These
 21 thirty-four monthly payments average \$8,626.27 per month.

22
 23 ¹ The court grants Cygnus's request, *see* dkt. no. 18 in Case No. 04-01791, for thirty more days to
 24 provide this information.

25 ² John Sutton has filed numerous declarations. All references in this order to a Sutton declaration
 26 are to the February 17, 2006 "Declaration of Sutton in Support of Motion for Money Judgment,"
 27 docket entry no. 28 in Case No. 04-01791.

³ This entity appears to be referred to as "IMT" by its own counsel, but "GlobalTel" by Cygnus and
 28 the entity itself. *Compare* Sutton Decl., Ex. 246 at 1 *with id.* ¶ 6, Ex. 245 at 1.

⁴ Cygnus incorrectly determined the sum of the commissions to be \$292,837.61. *Compare* Mot. at 2
 29 *with Sutton Decl.*, Ex. 247 at 1.

1 Cygnus seeks to recover not only for the period of April 2003 to December 2005, but also
 2 January and February 2006. Cygnus has produced no evidence whatsoever that Access Networks
 3 received any commissions for those two months. Cygnus merely asks the court to "assume similar
 4 revenue" at the same average monthly rate as for April 2003 to December 2005. Mot. at 2 (dkt.
 5 no. 27), Case No. 04-01791. This the court cannot do without some proof.

6 The GlobalTel-Access Network contract states that GlobalTel will pay Access Network an
 7 8.5 percent commission on sales. Sutton Decl., Ex. 245 at 5. An 8.5 percent commission of
 8 \$293,293.18 indicates total sales of \$3,450,508.⁵

9 Cygnus seeks a 4 percent royalty as damages against Access Network. Mot. at 3. This court
 10 has previously determined in another uncontested hearing that 4 percent of a defendant's gross
 11 revenues is a reasonable royalty for use of Cygnus's patents. *Cygnus Telecomms. Tech. v. Call*
 12 *Point*, No. 03-00876 (N.D. Cal. Aug. 19, 2003) (order granting plaintiff damages in connection with
 13 default judgment); *see also* 35 U.S.C. § 284 (damages for patent infringement shall not be "less than
 14 a reasonable royalty for the use made of the invention by the infringer"). Four percent of \$3,450,508
 15 is \$138,020.32, and the court will award Cygnus this amount in damages.

16 Cygnus's complaint did not state any amount of damages, Compl. ¶ 7 ("The amount of
 17 money damages is not presently known."), Case No. 04-01791, and the relief prayed for included
 18 "[d]amages adequate to compensate for the infringement," *id.* at 3. A default judgment cannot
 19 exceed the amount sought in the complaint. *SEC v. Wencke*, 577 F.2d 619, 623 (9th Cir. 1978)
 20 (Fed.R.Civ.P. 54(c) does not allow court to award relief "beyond that requested in the complaint.").
 21 However, the Ninth Circuit allowed a default judgment on a complaint containing a demand for a
 22 stated sum plus "amounts of which Plaintiff will prove at the time of trial" to exceed the stated sum.
 23 *Henry v. Sneiders*, 490 F.2d 315, 317 (9th Cir. 1974); *but see Fong v. United States*, 300 F.2d 400,
 24 412 (9th Cir. 1962) ("Since the prayer limits the relief granted in a judgment by default, the prayer
 25 must be sufficiently specific that the court can follow the mandate of the Rule."). Under *Henry*,
 26 Cygnus's prayer for relief appears sufficient for this court to award Cygnus \$138,020.32 as a
 27 reasonable royalty for Access Network's infringement.

28⁵ \$293,293.18 ÷ 8.5% = \$3,450,508.

1 Cygnus seeks to limit judgment to "infringement by GlobalTel and Access acting jointly."
 2 Mot. at 3. Though Cygnus states that GlobalTel and Access Network are jointly and severally liable
 3 on the damages at issue in this case, GlobalTel is not a defendant in Case No. 04-01791, the action
 4 in which Cygnus has filed for default against Access Network. Nothing in this order should be
 5 construed as determinative of any liability GlobalTel may have to Cygnus or Access Network.

6 The court will enter judgment for Cygnus against Access Network in the amount of
 7 \$138,020.32.

8 **B. Injunction**

9 A permanent injunction should issue in patent cases based on "traditional equitable
 10 principles." *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1840 (2006). The court is satisfied
 11 that Cygnus has shown by default "(1) that it has suffered an irreparable injury; (2) that remedies
 12 available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,
 13 considering the balance of hardships between the plaintiff and defendant, a remedy in equity is
 14 warranted; and (4) that the public interest would not be disserved by a permanent injunction" against
 15 Access Network infringing Cygnus's patents. *See id.* at 1839. The court will grant Cygnus's request
 16 for a permanent injunction against Access Network.

17 **II. PRELIMINARY INJUNCTION AGAINST GLOBALTEL**

18 Cygnus seeks a preliminary injunction against GlobalTel. The only case in which GlobalTel
 19 is a defendant, Case No. 03-03594, was stayed when Cygnus made this motion. It would be unjust
 20 in the posture of these cases to base a preliminary injunction against GlobalTel on a default
 21 judgment against Access Network. GlobalTel is a defendant and active participant in a different
 22 case than the one against Access Network. Cygnus's motion for a preliminary injunction against
 23 GlobalTel is denied without prejudice.

24 GlobalTel, though, does not object to Cygnus's request that GlobalTel pay any money due
 25 Access Network to Cygnus instead. The court will grant this request as a reasonable extension of
 26 the injunction against Access Network.

III. ORDER

For the reasons given above, the court

- (1) awards Cygnus \$138,020.32 as a reasonable royalty for Access Network's infringement through December 2005;
 - (2) permanently enjoins Access Network and its officers, agents, employees, and those acting in concert with it from infringing U.S. Patent Nos. 5,883,964 and 6,035,027;
 - (3) orders GlobalTel to pay any monies it would otherwise owe Access Network to Cygnus as they come due; and
 - (4) denies Cygnus's motion for a preliminary injunction against GlobalTel without prejudice.

DATED: 5/30/06

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

1 **A copy of this order was mailed on _____ to:**

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18 Counsel are responsible for distributing copies of this order to co-counsel, as necessary.

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